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No. 86-637

In The

Supreme Court of the United States

October Term, 1986

COMMUNICATIONS WORKERS OF AMERICA AND ITS LOCALS 2100, 2101, 2108, and 2110,

Petitioners,

v.

HARRY E. BECK, JR., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION; SAG LEADERS FOR LABOR JUSTICE; CHARLTON HESTON; CLAUDE AKINS; ISABEL BONIFACE; RORY CALHOUN; DON DE FORE; HUGH GILLIN; HOWARD KEEL; MARK MC INTIRE; CHRISTOPHER MITCHUM; MORGAN PAULL; MARIE WINDSOR; AND ALAN YOUNG IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED	ii
IDENTITY AND INTEREST OF AMICI	1
OPINION BELOW	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	4
INTRODUCTION	4
ARGUMENT	6
I. THE HANSON LINE OF CASES SUPPORTS A FINDING OF GOVERNMENT ACTION	6
A. Express Government Authorization Constitutes Government Action	6
B. The Nonpreemption Provision of NLRA Does Not Negate Government Action	8
II. THE CONDUCT AT ISSUE IS OUTSIDE THE ZONE OF PRIVATE RIGHTS	11
CONCLUSION	14

TABLE OF AUTHORITIES

Page

Cases

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 7, 12

Algoma Plywood v. Wisconsin Employment Relations Board, 336 U.S. 301 (1949) 9

Blum v. Yaretsky, 457 U.S. 991 (1982) 11

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 11

Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, 466 U.S. 435 (1984) 7, 8

International Association of Machinists v. Street, 367 U.S. 740 (1961) 7

Jackson v. Metropolitan Edison Company, 419 U.S. 345 (1974) 11

Lugar v. Edmondson Oil, 457 U.S. 922 (1982) 4, 12, 13

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 11

National Labor Relations Board v. General Motors Corp., 373 U.S. 734 (1963) 9, 10, 14

Railway Employes' Department v. Hanson, 351 U.S. 225 (1956) 4, 7, 8, 14

Reitman v. Mulkey, 387 U.S. 369 (1967) 11

Rendell-Baker v. Kohn, 457 U.S. 830 (1982) 11

Retail Clerks International Association v. Schermerhorn, 375 U.S. 96 (1963) 9

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 9

Shelley v. Kraemer, 334 U.S. 1 (1948) 11, 12

TABLE OF AUTHORITIES—Continued

Page

STATUTES

29 U.S.C. § 151, et seq. 4, 5
§ 158(a)(3) 5, 8
§ 164(b) 5

RULES

Supreme Court Rule No. 36 1

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IDENTITY AND INTEREST OF AMICI

Amici, Pacific Legal Foundation, *et al.*, file this brief pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for the parties and has been lodged with the clerk of this Court.

Pacific Legal Foundation (PLF) is a nonprofit, charitable corporation organized under the laws of the State of California for the purpose of litigating issues involving the public interest. Policy for the Foundation is

set by a Board of Trustees made up of concerned citizens, the majority of whom are attorneys. The Board of Trustees approves participation in a case only when there is broad support for PLF's position in the general community. The Board has approved the filing of this brief.

This case involves the issue of whether workers governed by federal labor law are entitled to the protections of the Federal Constitution in their labor relations activities. In resolving this issue, the Court's decision is likely to go a long way toward settling the issue of what constitutes "government action" and thus will determine the types of activities that will be subject to constitutional strictures. As such, the members and supporters of Pacific Legal Foundation are vitally interested in this litigation.

SAG Leaders for Labor Justice is an unincorporated association whose sole purpose is to seek legislative and/or judicial remedies to First Amendment violations caused by the expenditure of compulsory labor association dues on matters not germane to collective bargaining. Membership in the association is limited to 12 individuals who are now or at one time have been elected officials of the Screen Actors Guild.

Charlton Heston is the President of SAG Leaders for Labor Justice and former President of the Screen Actors Guild. Claude Akins is the former National Recording Secretary for the Screen Actors Guild. Isabel Boniface is a current board member of the Screen Actors Guild. Rory Calhoun is a former board member of the Screen Actors Guild. Don De Fore is a current board member of the Screen Actors Guild. Hugh Gillin is a former board member of the Screen Actors Guild.

Howard Keel is a past President of the Screen Actors Guild. Christopher Mitchum is currently the First Vice President of the Screen Actors Guild. Morgan Paull is a former board member of the Screen Actors Guild. Marie Windsor is currently the Eleventh Vice President of the Screen Actors Guild. Alan Young is a current board member of the Screen Actors Guild.

Each of these individuals is now or has been employed in an aspect of the motion picture/television industry covered by a collective bargaining contract with the Screen Actors Guild. In order to be employed in the industry one must belong and pay dues to the Screen Actors Guild. In addition to negotiating and enforcing collective bargaining agreements, the Screen Actors Guild expends compulsory dues revenues for political causes with which these amici do not agree. Amici are thus vitally interested in the instant action.

Amici are familiar with the issues, facts, and circumstances in this action and the scope of their presentation before this Court.

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OPINION BELOW

The opinion of the en banc panel of the United States Court of Appeals for the Fourth Circuit is reported at 800 F.2d 1280 (1986).

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STATEMENT OF THE CASE

Amici adopt respondents' statement of the case.

SUMMARY OF ARGUMENT

In a line of cases beginning with *Railway Employes' Department v. Hanson,* 351 U.S. 225 (1956), this Court has ruled that constitutional protections attach to agency fee agreements negotiated pursuant to federal labor law authorization. The fact that the National Labor Relations Act (NLRA) does not preempt state prohibitions of agency shop contracts does not affect this analysis.

Analyzing the government action issue in general, the most important point to keep in mind is the purpose of the requirement. As this Court noted in *Lugar v. Edmondson Oil,* 457 U.S. 922 (1982), the government action requirement preserves a domain of individual freedom of action free from federal judicial power. A finding of "government action" in this case will not invade this domain of individual freedom and private contract.

INTRODUCTION

Concerned with disruptive and often violent strikes, Congress enacted the NLRA (29 U.S.C. § 151, *et seq.*) to govern labor relations in the private sector. The NLRA openly encourages collective bargaining as the preferred

method of employer-employee relationships. 29 U.S.C. § 151. Collective bargaining allows employees, by majority vote, to designate an exclusive representative to bargain with the employer on the terms and conditions of employment. Once this exclusive bargaining representative is selected, the NLRA compels the employer to the bargaining table. To interpret and enforce the terms of the NLRA, the National Labor Relations Board (NLRB) was created. The NLRB has the power to prosecute unfair labor practices and to seek judicial enforcement of its orders.

For the most part, the NLRA displaces both state legislative and judicial power over covered employer-employee actions. Only in the area of union security agreements does Congress allow the states to participate in labor policy-making. 29 U.S.C. § 164(b). Even in that situation, Congress limited the state's role to deciding whether or not to ban such security agreements. *Id.*

In the absence of such state ban, the NLRA expressly authorizes the employee association to bargain for an agency shop fee clause in the collective bargaining agreement. 29 U.S.C. § 158(a)(3). Agency shop requires all employees in a bargaining unit to pay a fee equal to membership dues to the association serving as exclusive representative, whether or not the employee is a member or even wishes to become a member of that association. *Id.* The rationale behind the authorization of such compelled fees is to ensure that all employees pay their fair share of the costs of collective bargaining. Problems arise, however, when portions of the fee are used for the political and ideological activities of the employee association. In such cases, the nonmember employees generally complain

that such compelled political donations violate their First Amendment freedoms of speech and association.

The First Amendment, like most other provisions of the Constitution, does not regulate purely private conduct. Instead, the freedoms of speech, assembly, association, etc., are protected only from government infringement. Thus, to claim protection of the First Amendment, it must be shown that the infringement complained of exists directly or indirectly at the behest of the government. This is referred to as the "government action" requirement.

At issue in this case is the question of whether agency fee agreements entered into pursuant to the NLRA must conform to the requirements of the First Amendment. Specifically, is the NLRA's authorization of agency shop sufficient government action to invoke the protections of the Federal Constitution? Amici contend that such authorization in this case does indeed constitute "government action."

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ARGUMENT

I

THE HANSON LINE OF CASES SUPPORTS A FINDING OF GOVERNMENT ACTION

A. Express Government Authorization Constitutes Government Action

This Court began to examine the government action issue in the context of agency shop fees in *Railway*

Employes' Department v. Hanson, 351 U.S. 225. In that case, an employee residing in Nebraska challenged the constitutionality of compelled fees noting that his state had outlawed the closed shop arrangements. This Court noted that the Railway Labor Act (RLA), which expressly authorized agency fee agreements, preempted contrary state legislation. Although the RLA did not compel the employer and employee association to include an agency fee arrangement in the collective bargaining agreement, this Court found "government action" by reason of the fact that the agreement would have been illegal under Nebraska law but for the preemptive status of the federal law.

Certainly, the narrow holding of *Hanson* rests on this feature of preemption. The language of the *Hanson* decision, however, seems to go further:

> "If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. . . . In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed." *Id.* at 232.

As this Court considered other issues in the agency shop context, the issue of preemption of state law did not seem to take on the importance ascribed to it in *Hanson.* Instead, attention centered on the point that government could not authorize private conduct violative of First Amendment rights. *See International Association of Machinists v. Street,* 367 U.S. 740, 777 (1961) (Douglas, J., concurring), *cited in Abood v. Detroit Board of Education,* 431 U.S. 209, 226 n.23 (1977). This line of reasoning culminated in this Court's decision in *Ellis v. Brotherhood*

of Railway, Airline and Steamship Clerks, 466 U.S. 435 (1984), in which the issue of the RLA's preemptive effect was not discussed at all. True, *Ellis* was decided under the same provisions of the RLA as was *Hanson.* In *Ellis,* however, there was no state statute outlawing the agency fee agreement at issue. Analytically, the *Ellis* decision's implicit finding of government action can rest only on one of two grounds. Either government action is present because the state government has been precluded from effective legislation in the area or because the federal legislation specifically authorized the conduct at issue.

As with the RLA, the NLRA specifically authorizes compelled agency fee arrangements.[1] Unlike the RLA, however, the NLRA does not preempt state laws forbidding agency shop. The issue now before this Court is whether this distinction results in a different application of federal constitutional protections for workers covered by the NLRA and the RLA.

B. The Nonpreemption Provision of NLRA Does Not Negate Government Action

As noted above, the NLRA specifically does not preempt state legislation forbidding agency shop. In the absence of such state law, however, agency fee agreements are specifically authorized by the NLRA. This Court has

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[1] In fact, because of the way that the Act is worded, if agency shop were not specifically authorized, it would be illegal under the Act. The Act specifically prohibits employer discrimination against employees on the basis of membership or nonmembership in a union. Thus, but for the proviso in Section 8(a)(3) (29 U.S.C. § 158(a)(3)), agency shop agreements would be illegal.

given the nonpreemption provision both an expansive reading and a narrow one, neither conflicting with the other. On the one hand, for instance, this Court has ruled that the nonpreemption clause of the NLRA applies to court jurisdiction as well as state legislation. Thus, in a state that has a law forbidding agency shop agreements, the state court is permitted to enforce the state law. *Retail Clerks International Association v. Schermerhorn,* 375 U.S. 96 (1963). This is at odds with normal NLRA practice where state judicial jurisdiction is wholly displaced by the National Labor Relations Board. *See San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). On the other hand, this Court has downplayed the significance of the nonpreemption section noting that it only provides that federal policy on this issue is not exclusive. *Algoma Plywood v. Wisconsin Employment Relations Board,* 336 U.S. 301 (1949); *Schermerhorn,* 375 U.S. at 104.

The fact that federal policy on agency shop under the NLRA is not exclusive does not mean that there is no federal policy at all. Indeed, in the enactment of the NLRA Congress considered several forms of closed shop arrangements and weighed the advantages and disadvantages of each. At one time, the NLRA authorized "closed shops" whereby the employees would be required to become members of the union representing the bargaining unit. *National Labor Relations Board v. General Motors Corp.,* 373 U.S. 734, 739 (1963). Congress amended this provision so that now only agency shops are authorized. Under the agency shop, the only compelled conduct is payment of a periodic fee to the employee association. Congress' purpose in authorizing this private taxation system was not

to enrich employee associations nor to broaden the association's political activities. Instead, Congress always had as its overriding purpose in enacting the various provisions of the NLRA the promotion of a system of collective bargaining as a means of achieving labor peace. *Id.* at 743. In determining the form of union security arrangement to authorize (*i.e.*, closed shop or agency fee) Congress needed to balance this overall goal of collective bargaining with the competing issues of the problems of the "free rider" versus the problems of compulsory unionism. *Id.*

Thus, Congress did not abandon the policy decision on agency fees to the state, but instead chose to share it. By allowing this freedom of the states to legislate in this one narrow area, Congress did not remove the hand of government from the agency shop agreements. The only choice left to the states was to allow or not allow agency shop agreements. If the state decided to allow the agreement, or otherwise did not legislate on the issue, federal law commands that the issue is one of the subjects of permissible bargaining. Refusal of the employer to bargain on this issue is an unfair labor practice punishable under federal law by a federal agency. *See id.* at 737. Agency shop exists under the NLRA only as a conscious policy decision of Congress. *See* Footnote No. 1. The mere fact that the states are not prohibited from outlawing agency shop does not negate the government action present in authorizing, encouraging, and enforcing such agreements. The Court of Appeals was correct in its finding of sufficient government action in this case to invoke the protections of the Constitution.

II

THE CONDUCT AT ISSUE IS OUTSIDE THE ZONE OF PRIVATE RIGHTS

This Court has used a number of different formulations in determining the presence or absence of government action. In *Shelley v. Kraemer,* 334 U.S. 1 (1948), this Court found such government involvement in judicial enforcement, while in *Reitman v. Mulkey,* 387 U.S. 369 (1967), the finding of government action was predicated on a none too subtle policy of government encouragement for the action at issue.

Other cases have looked to whether government has compelled or influenced the action (*Rendell-Baker v. Kohn,* 457 U.S. 830 (1982)), or approved, encouraged, or coerced the act at issue (*Blum v. Yaretsky,* 457 U.S. 991 (1982)). Still other cases have looked for a nexus between the conduct and the government regulation (*Jackson v. Metropolitan Edison Company,* 419 U.S. 345 (1974)), while one decision sought to determine whether the state was the impetus or enforcer of the conduct at issue (*Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972)). Many of the cases come back to the rationale that government may not abdicate its responsibility by failing to act. *E.g., Reitman v. Mulkey, supra; Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961).

In his amicus brief, the Solicitor General seeks to categorize these cases on the basis of which constitutional right was at stake. The solicitor argues, for example, that what constitutes government action in the context of the Equal Protection Clause does not necessarily constitute government action in the context of other constitutional

freedoms. Such a distinction finds no support in either logic or the decisions of this Court.

Looking to the constitutional protection at issue helps this analysis only in the case of the Thirteenth Amendment, the one provision of the Constitution that clearly speaks to private conduct. Thus, the question of whether there exists government action would simply be irrelevant. In other circumstances, however, it makes no sense to look to the constitutional provision involved in order to determine the presence or absence of government action. To do so would suggest that some provisions of the Constitution proscribe private conduct in the same manner as government conduct. The solicitor's argument also fails because it ignores prior decisions of this Court. For instance, *Shelley v. Kraemer* involved the Equal Protection Clause of the Fourteenth Amendment, yet this Court cited to it for support in its finding of government action in *Abood v. Detroit Board of Education*, a case involving First Amendment protections of speech and association. *Abood*, 431 U.S. at 218 n.12.

Although the solicitor fails in his attempt, there exists a need to categorize and harmonize this Court's various decisions on the issue of government action. The first step in this process was taken by this Court in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, where the purpose of the government action requirement was discussed:

> "As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments . . . .' Careful adherence to the 'state action' requirement preserves an area of individual

freedom by limiting the reach of the federal law and federal judicial power." *Id.* at 936.

This framework starts by recognizing the purpose of the government action requirement and asks if a finding of government action in this case will serve or defeat that purpose. In other words, is the government a mere incidental party to conduct at issue, or is the conduct taking place in a framework wholly of government creation? Such an analysis subsumes questions of nexus, encouragement, authorization, compulsion, and coercion. In the case before the Court, the analysis leads to a finding of government action.

It can be argued that the conduct in the instant case results from the purely private action of the employer and the employee association agreeing to the terms of a collective bargaining agreement. Such an argument, however, ignores the greater context in which such an agreement takes place. Pursuant to federal law, the employer is compelled to bargain with the association proving it has the support of a majority of the employees. The dissenting employees cannot form their own group to bargain with the employer and in fact they are bound by the terms of the collective bargaining agreement negotiated by the majority association. These results are not compelled by common law, but instead the federal bargaining law itself. In fact, it was these same results, in part, that led Congress to authorize agency shop agreements in the first place. The agency shop is thought to provide the necessary compensation to the employee association to bargain fairly on behalf of all employees in the bargaining unit, whether

they belong to the association or not. *See National Labor Relations Board v. General Motors,* 373 U.S. at 743. While Congress is free to make such a policy judgment and legalize such a compulsory fee arrangement, it is not free to authorize compelled association or subsidization of the viewpoints of others. The negotiation and enforcement of the agency shop are not, then, purely private arrangements. Agency shop relies for its very existence on federal law. This is the essence of government action and the decision of the Court of Appeals should be affirmed.

CONCLUSION

The agency fee at issue in this case is not the result of a purely private contractual agreement. Rather, it is the result of a federally constructed framework that compels parties to the bargaining table, specifies what may or may not be the subjects of bargaining, compels nonsignatories to the terms of the agreement, and enforces these rules with a federal agency and federal judicial authority. It is not difficult to find "government action" in this context, instead it is difficult to ignore. Further, in the line of cases beginning with *Hanson,* this Court has offered the protections of the Federal Constitution to employees placed in an agency fee situation by a federal bargaining law. Those cases compel the same result in the instant

action. The decision of the Court of Appeals should be affirmed.

DATED: August, 1987.

Respectfully submitted,

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